80-1617

No. 80—

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1980

In re

JAMES K. STERRITT,

Petitioner.

APPLICATION FOR A WRIT OF HABEAS CORPUS

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No. 80—

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980.

In re JAMES K. STERRITT,

Petitioner.

APPLICATION FOR A WRIT OF HABEAS CORPUS

The application of James K. Sterritt for a Writ of Habeas Corpus respectfully shows

1. This original application for a Writ of Habeas Corpus is submitted to this Court pursuant to 28 U.S.C. §§2241 and 2242.

2. The jurisdiction of this Court to entertain this application is derived from Article III and Article I, Sec. 9 (clause 2) of the United States Constitution, 28 U.S.C. §2241 and 28 U.S.C. §1651.

3. The reason for not making this application to the District Court for the Northern District of New York (the District in which I am held) is that the order under which I

am committed and detained was made by the United States Court of Appeals for the Second Circuit in a contempt proceeding initiated in the Court of Appeals. I was not a party in any prior proceeding. I suggeset that the District Court does not have or should not exercise habeas corpus jurisdiction in these circumstances because, under 28 U.S.C. §1291, its decision would be subject to appeal to the Court of Appeals. Further, this Court has power under 28 U.S.C. § 2241 to grant the Writ in the first instance and, I submit, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an immediate grant of the Writ by this Court. Finally, to the extent that I may affect the identity of the forum, I desire to avoid the Court of Appeals for the Second Circuit. Before ordering my imprisonment, they issued no decision or opinion and signed every order as proposed by the NLRB. Their lack of attention is demonstrated by the fact that the copy of the Court's contempt adjudication order delivered to me by the Deputy U.S. Marshal upon my arrest still had attached to it the NLRB certificate of service of that order on my attorney at the time it was proposed to the Court by the NLRB.

4. I am now committed to and detained in the Ulster (New York) County Jail which is controlled and operated by Walter T. Bashnagel, the Sheriff of Ulster County, and which is located on Golden Hill Drive in the City of Kingston, New York.

5. Earlier today, March 25, 1981, I was attached by a Deputy United States Marshal who advised me that he was acting for and under the authority of Eugene Madden, Jr., United States Marshal for the Northern District of New York, that I am being held in the custody of William French Smith as Attorney General of the United States and that I am committed to the Ulster County Jail as a contract facility of the United States Marshal for the Northern District of New York.

6. I am committed and detained under a Writ of Attachment dated March 3, 1981 which was filed on that day in the office of the Clerk of United States Court of Appeals for the Second Circuit and which provides that it is "ENTERED BY ORDER OF THE COURT" and is signed by United States Circuit Judges Leonard P. Moore, Thomas J. Meskill and Amalya L. Kearse. The Writ was issued pursuant to two orders signed by the same Judges on March 3, 1981 and all are made a part of this Application and attached as follows:

Exhibit A—WRIT OF ATTACHMENT (JAMES K. STERRITT)
Exhibit B—NOTICE OF MOTION and ORDER
Exhibit C—ORDER.

7. On October 17, 1975 and December 30, 1976 the Court of Appeals entered orders enforcing a National Labor Relations Board order against James K. Sterritt, Inc. and Concrete Haulers, Inc., respondents in an unfair labor practice proceeding.

8. On August 31, 1977 the NLRB sought a civil contempt adjudication from the Court of Appeals by a motion in which I, personally, and a third corporation, Sterritt Trucking, Inc., were named as "Additional Respondents in Contempt." By its November 19, 1977 Order of Reference, the Court of Appeals referred the NLRB motion to a U.S. Magistrate for hearing.

9. At the close of the NLRB's presentation in the hearing before the U.S. Magistrate, the NLRB attorney stated that

> MR. DONNELLY : I will make this representation to the court. The Board does not attempt to collect any portion of the back pay obligation from

> the personal property or assets of Mr. Sterritt, as an individual, as opposed to the corporations, except to the extent that it could be or has been or will be shown that the assets of any one of the corporations has been converted to the personal property of Mr. Sterritt, or in a manner such that any one of those corporations has suffered a depletion in its assets because of a conversion by Mr. Sterritt, if such has occurred or because of the removal by him of cash assets or anything else of value from any of the corporations. If it can be shown that something of value has been removed in that manner and now resides with him, personally, or has been converted by him for value, or otherwise to someone else, then those assets—the Board is taking the position those assets are reachable because they left a depletion in the value or worth of the corporation.

Contrary to that representation, both the NLRB and the Court of Appeals are now seeking satisfaction of the back pay order from my general and unrelated assets. I concede that my personal assets are liable to the extent of any finding that "the assets of any one of the [respondent] corporations has been converted to [my] personal property..." or that I caused a "depletion" or "removal" of such assets. No such finding of liability has been made. Rather, the Order of Attachment and my present detention seek to make all my assets liable for payment, regardless of the extent of any alleged "diversion." In its zeal to enforce the NLRB order, the Court of Appeals has not required findings as to the extent of my liability. Rather, they have imposed absolute liability.

10. An excerpt from the hearing transcript containing the statement quoted above is attached to and made a part of this Application as Exhibit D. It shows that alleged "diversions" were discussed and that the NLRB attorney

conceded that any such "diversions" were tenuous and minor. In any event, he never requested or obtained any finding with respect to the amount of any such alleged "diversion." I concede that I would be personally liable to the extent of any such finding.

11. The motion for contempt adjudication was argued before the Court of Appeals which, without opinion or decision, issued on March 25, 1980 the contempt adjudication proposed by the NLRB which is attached to and made a part of this Application as Exhibit E.

12. Upon information and belief, the wording of the contempt adjudication of the Court of Appeals (Exhibit E) does not clearly reach my personal and unrelated assets. However, that issue was argued orally and in writing to the Court of Appeals and the NLRB maintains that the Order did, in fact, reach my personal and unrelated assets. Thereafter, I petitioned this Court for a Writ of Certiorari to review the contempt adjudication. That petition was denied on October 6, 1980 in Case No. 79-2025.

13. The NLRB's Notice of Motion for a Writ of Attachment (Exhibit B) demonstrates that I am now imprisoned to force payment of all corporate respondents' obligations from any and all of my personal assets. It asserts (*supra,* page E-4) that

> Sterritt is liable *personally and* as chief officer of the corporate respondents for compliance with the judgments and contempt adjudication. Sterritt's continued refusal to *personally* purge his contempt requires his arrest as the necessary means to compel his attention to the obligations under the Court's order. (Emphasis added.)

The Court of Appeals, without opinion or decision, granted the motion in its Order which is endorsed on that Notice of Motion (*supra,* page E-4) and it also issued a separate Order (Exhibit C) proposed by the NLRB.

14. On information and belief, my imprisonment is contrary to law on each of the following grounds:

A. Content of Contempt Adjudication Order

The issue of my vicarious personal liability was argued orally and in writing before the Court of Appeals. However, the Order adjudicating contempt (Exhibit E) merely declares all respondents to be in contempt and provides for purgation by complying with the original judgments enforcing the NLRB backpay orders. Clearly, those NLRB orders relate only to the original respondents in the NLRB proceeding. I am now imprisoned to compel that payment from my personal and unrelated assets and not just to enforce my obligations as an officer and agent of those respondents. This obliteration of the corporate veil by the Warrant of Attachment is not supported by the content of the contempt adjudication which, on its face, does not extend the plenary obligations of the "Respondents" to the "Respondents in Contempt."

B. Jurisdiction

The NLRB is empowered by 29 U.S.C. §160(e) to petition a Court of Appeals for the enforcement of its orders. The repeated use of the terms "such person" in §160(e) clearly limits the jurisdiction of the Court to persons who have been charged with unfair labor practices and subsequently found "guilty" under NLRB procedures. Officers, agents, successors and assigns can be and are naturally included within the terms "such person" and, therefore, the jurisdiction of the Court. I readily concede

that the Court has jurisdiction to add "Respondents in Contempt" *as officers, agents, etc.* However, the Court has here gone much further by extending its jurisdiction to me in my personal capacity and to my assets which have no relation to the original respondents. I could readily have been named a respondent in the NLRB proceeding and my personal involvement (as distinguished from my acts as officer and agent) would have been litigated before the NLRB. I submit that a Court of Appeals lacks the authority to create such jurisdiction over my person in its own enforcement proceeding.

C. Deprivation of Liberty and Property Without Due Process

I am now imprisoned under a Writ of Attachment (Exhibit A) and as a result of a contempt adjudication (Exhibit E) of the United States Court of Appeals for the Second Circuit. The Court of Appeals referred the motion for contempt adjudication to a U.S. Magistrate for a hearing in which I was personally a party as a "Respondent in Contempt." In the course of the NLRB presentation at that hearing, its attorney stated "I will make this representation to the court. The Board does not attempt to collect any portion of the back pay obligation from the personal property or assets of Mr. Sterritt . . ." (*supra,* page E-7). In presenting my case, my attorney was, therefore, confident that my person and personal property, as such, were not in jeopardy and did not pursue the issue. I am now imprisoned by an NLRB "attempt to collect the back pay obligation from the personal property or assets of Mr. Sterritt . . ." In effect and reality, I am imprisoned without a hearing and findings on the issue of the extent of my personal liability. I am deprived of my liberty and property without due process of law in violation of the Fifth Amendment of the United States Constitution.

15. No prior application has been made to any court or Judge for any relief from my detention and imprisonment.

16. Upon the filing of this Application with the Clerk of this Court, an application for bail will be submitted to Associate Justice Thurgood Marshall.

WHEREFORE and pursuant to 28 U.S.C. §2243, I pray that this Court forthwith award the Writ of Habeas Corpus or issue an order directing that the Marshal for the Northern District of New York, the Solicitor General of the United States and the General Counsel of the National Labor Relations Board show cause why the writ should not be granted and, when the Writ or Order is returned, that the Court set a day for hearing and that the Court summarily hear and determine the facts and dispose of the matter as law and justice require.

/s/ James K. Sterritt
JAMES K. STERRITT

STATE OF NEW YORK)
) ss.:
COUNTY OF ULSTER)

James K. Sterritt, being duly sworn, deposes and says that he resides at R.D. 2, Route 28A, Valatie (Columbia County), New York, that he is the Petitioner herein, that he has read the foregoing Application for a Writ of Habeas Corpus and knows the contents thereof and that the same is true except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

/s/ James K. Sterritt
JAMES K. STERRITT

Sworn to before me this
25th day of March, 1981.

/s/ Herbert Gertner
Notary Public, State of New York
Residing in Ulster County
Commission Expires March 30, 1981

/s/ Arthur F. McGinn, Jr.
ARTHUR F. MCGINN, JR.
Attorney for Petitioner
41 State Street
Albany, New York 12207
518-436-7684

Exhibit A—Writ of Attachment (James K. Sterritt).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JAMES K. STERRITT, Inc. and CONCRETE HAULERS, Inc.,

Respondents,

and

STERRITT TRUCKING, Inc. and JAMES K. STERRITT,

Additional Respondents in Contempt.

Nos. 75-4044
76-4253

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the United States Marshal for the Northern District of New York or to the United States Marshal for any District in which James K. Sterritt may be found:

Exhibit A—Writ of Attachment (James K. Sterritt)

Greetings:

Pursuant to an order of the United States Court of Appeals for the Second Circuit entered on March 3, 1981, you and your deputies are hereby commanded to attach the person of James K. Sterritt, now or formerly residing at R.D. 2, Rt. 28A, Valatie, New York, and place him in custody of the Attorney General of the United States, to be held in such custody until by further order of this Court it appears that the above-named respondents have purged themselves of contempt as found and adjudicated in this Court's order of March 25, 1980.

You will further deliver to said James K. Sterritt as soon as may be practicable after apprehending him under this writ, a duly attested copy of the above-mentioned contempt adjudication of March 25, 1980, of the Court's orders of October 17, 1975 and December 30, 1976, enforcing orders of the National Labor Relations Board, and of the order authorizing this writ, so that there be no doubt of his learning of the manner in which respondents may purge themselves of contempt.

Upon execution of the writ, you will make due return.

Dated: March 3, 1981

ENTERED BY ORDER OF THE COURT

Hon. LEONARD P. MOORE, *USCJ*
Hon. THOMAS J. MESKILL, *USCJ*
Hon. AMALYA L. KEARSE, *USCJ*

United States Court of Appeals
Second Circuit
Filed Mar 3 1981
A. Daniel Fusaro, Clerk

Exhibit B—Notice of Motion and Order.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD

v.

JAMES K. STERRITT, Inc. and CONCRETE HAULERS, Inc.

75 4044
76 4253

Notice of motion for issuance of writ of body attachment.

Motion by: Paul Elkind (202) 254-9306.
Has opposing counsel consented? [X] No
Has service been effected? [X] Yes
Is oral argument desired? * [X] No *Should be referred to panel under Court Rule 27(b).
Judge or agency whose order is being appealed: Judges: Meskill and Kearse
Opposing Counsel: Arthur F. McGinn, Jr. (518) 436-7684
Brief statement of the relief requested: Order for writ of body attachment against James K. Sterritt during his continued refusal to purge contempt and obey the Court's judgment and contempt adjudication
Previous requests for similar relief and disposition: None

Exhibit B—Notice of Motion and Order

Statement of the issue(s) presented by this motion: Whether James K. Sterritt should be taken in custody of the United States Marshal until respondents purge the contempt found by the Court.

Brief statement of the facts (with page references to the moving papers): Sterritt is liable personally and as chief officer of the corporate respondents for compliance with the judgments and contempt adjudication. Sterritt's continued refusal to personally purge his contempt requires his arrest as the necessary means to compel his attention to the obligations under the Court's order.

Summary of the argument (with page references to the moving papers): Body attachment is the appropriate remedy against an intransigent contemnor where other attempts at inducing his compliance have been willfully spurned.

Dated: Dec. 9, 1980

PAUL ELKIND
Attorney for National Labor Relations Board

It Is Hereby Ordered that the motion be and it hereby is granted.

Leonard P. Moore
Hon. Leonard P. Moore, USCJ

3-3-81 Hon. Thomas J. Meskill, USCJ

Hon. Amalya L. Kearse, USCJ

United States Court of Appeals
Second Circuit
Filed Mar 3 1981
A. Daniel Fusaro, Clerk

Exhibit C—Second Circuit Court of Appeals Order for Attachment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

JAMES K. STERRITT, Inc., and CONCRETE HAULERS, Inc.,

Respondents,

and

STERRITT TRUCKING, Inc., and JAMES K. STERRITT,

Additional Respondents in Contempt.

Nos. 75-4044
76-4253

The Court having, on March 25, 1980, adjudged each of the above-named respondents and additional respondents in contempt, in civil contempt of this Court's judgments of October 15, 1975, and December 30, 1976, and ordered respondents, their officers, agents, successors and assigns to purge themselves of said contempt by, among other things, paying to the Board the sum of $86,012.00 and interest for the account of the persons named in the Board's order of June 18, 1976, and that in the event of failure

to purge themselves of contempt, a writ of attachment issue,

And said respondents having failed to purge themselves of contempt as directed, and for good cause appearing therefor,

IT IS ORDERED, that attachment issue directed to the United States Marshal for the Northern District of New York or the United States Marshal for any district in which James K. Sterritt may be found, commanding him to arrest James K. Sterritt and to keep his body in the custody of the Attorney General of the United States, provided, however, that if said respondents shall have complied with said adjudication and judgment to the extent of paying the total amount now due on the backpay awards amounting to $86,012.00 and interest, or such part thereof as the Board may accept in full or partial satisfaction thereof, then said writ of attachment shall abate.

By The Court:

Hon. LEONARD P. MOORE, *USCJ*
Hon. THOMAS J. MESKILL, *USCJ*
Hon. AMALYA L. KEARSE, *USCJ*

Dated: March 3, 1981

A true copy,
A Daniel Fusaro, Clerk

United States Court of Appeals
Second Circuit
Filed Mar 3 1981
A. Daniel Fusaro, Clerk

not absolutely stated, as he did off the record in this proceeding, that the National Labor Relations Board does not seek the personal funds of James K. Sterritt. I think the case they put in and the statement he made indicated that. He did state it off the record but I think that – especially since I have got to put in my case, that it should be stated for the record that you are not seeking the personal assets of James K. Sterritt.

MR. DONNELLY: I will make this representation to the court. The Board does not attempt to collect any portion of the back pay obligation from the personal property or assets of Mr. Sterritt, as an individual, as opposed to the corporations, except to the extent that it could be or has been or will be shown that the assets of any one of the corporations has been converted to the personal property of Mr. Sterritt, or in a manner such that any one of those corporations has suffered a depletion in its assets because of a conversion by Mr. Sterritt, if such has occurred or because of the removal by him of cash assets or anything else of value from any of the corporations. If it can be shown that something of value has been removed in that manner and now resides with him, personally, or has been converted by him for value, or otherwise to someone else, then those assets – the Board is taking the position those assets are reachable because they left a depletion in the value or worth of the corporation.

JUDGE SOLOMON: Is it your position, Mr. Donnelly, upon the evidence presented before, that you have established the fact that the individual did convert money from these corporations and did appropriate these moneys for his own personal use?

MR. DONNELLY: It has been established at least to this extent, that it was recited in the protective order filed by the Court of Appeals.

JUDGE SOLOMON: That's not before this court.

MR. DONNELLY: It sets out fully the Board's position on Mr. Sterritt's use of S & W Transport Agents. It appears from the record and the Board submits that while S & W Transport Agents were in existence, it was a partnership between Mr. Sterritt and his dispatcher, Mr. Whipper, they received 15 percent of the gross proceeds - the gross assets of Sterritt Trucking, Incorporated, out of which certain expenses were paid, such as the salary of a secretary and the wages of a handyman and some office expenses such as the telephone, utilities or electricity for Sterritt Trucking, and that the balance, or the remainder, after those expenses, were divided evenly between Mr. Whipper and Mr. Sterritt.

It's my position that - we suggest that signifies some important factors in this case. One, is that as to any claim of poverty by Sterritt Trucking, the fact that 15 percent of the gross proceeds being removed from the corporation, in itself, evidences that there was some cash available from the corporation to pay the back pay obligation.

Secondly, it's our position that any funds which have been so distributed by S & W Transport Agents are reachable by the court's judgment enforcing the back pay order of the Board, since it was established that those funds were divided between Mr. Sterritt and Mr. Whipper. If Mr. Sterritt has any such funds, they should be available to satisfy this obligation because they were the corporate funds of Sterritt Trucking, Incorporated. In essence, what has happened is simply that Mr. Sterritt has been paying himself a salary by taking out 15

percent and dividing it with Mr. Whipper and, as such, that represents nothing more than his putting money in the corporation which is thrown back to him as a salary, or whatever you call it, as a payment to him. The court did not establish anything else. That means it's available, at least to assist in the payment of this obligation and this is not an impoverished corporation. There was money there and the judgment should be able to reach some of that to help satisfy this obligation.

MR. McGINN: I understand what he said, but I would like to get a clarification. Is it the Board's position that Mr. Sterritt, personally, is not entitled to take a salary from this enterprise?

MR. DONNELLY: The Board doesn't take any position on what Mr. Sterritt, as an individual, is entitled to receive out of the corporation. The Board objects to the extent that you implied you didn't have any money and the fact that 15 percent of the corporation's gross receipts have been taken out of it, indicates you do have money and it's, as such, available.

MR. McGINN: Mr. Donnelly, are there any other instances that you looked to Mr. Sterritt, personally, that you can think of, in this record?

MR. DONNELLY: I, frankly, as of this point, cannot.

MR. McGINN: I don't either, frankly.

JUDGE SOLOMON: We'll adjourn for lunch 'til 2:00 p.m.

(A luncheon recess was taken from 1:00 to 2:00 p.m.)

Exhibit E—Second Circuit Court of Appeals Contempt Adjudication.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

JAMES K. STERRITT, INC., AND CONCRETE HAULERS, INC.,
Respondents,

and

STERRIT TRUCKING, INC., AND JAMES K. STERRITT,
Additional Respondents.
in Contempt.

Nos. 75-4011
75-4044
76-4253
75-4011
76-4253

ORDER

The Court having considered its Special Master's Report, dated July 19, 1979, and the exceptions and briefs of the parties, and having heard argument on January 11, 1980, hereby approves and adopts the Master's proposed findings, conclusions of Law, and recommendations. Wherefore,

IT IS ORDERED and ADJUDGED that James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc. and James K. Sterritt (hereinafter collectively referred to as "respondents") and each of them, are in civil contempt of the Court's judgments of October 17, 1975 and December 30, 1976, and,

IT IS FURTHER ORDERED that they shall purge themselves of said contempt by:

(i) Fully complying with the backpay provisions of the

judgments of October 17, 1965 and December 30, 1976, by forthwith paying the discriminatees the amounts and making the contributions which the Court has found will make them whole for the loss of earnings suffered by reason of the discrimination against them, together with interest thereon. Said principal amounts, as set forth in the Special Master's Finding No. 2, are as follows:

a) Backpay:

Robert Quick	$10,028
Thomas Monteverde, Jr.	19,419
Edward Jordan, Jr.	11,842
Allen Finch	13,758
Paul D. Overbaugh	7,067
Albert Quick, Sr.	7,770
Frank K. Ruhnke	9,509

b) Contributions to the Teamsters' pension fund:

Robert Quick	$1,104
Thomas Monteverde, Jr.	1,151
Edward Jordan, Jr.	1,000
Allen Finch	1,030
Paul D. Overbaugh	912
Albert Quick, Sr.	709
Frank K. Ruhnke	713

(ii) Mailing to each "owner-operator" or other employee of James K. Sterritt, Inc., Concrete Haulers, Inc., and Sterritt Trucking, Inc., copies of a notice in the form prescribed by the Board and signed by them by an appropriate officer, and by James K. Sterritt individually, stating that the aforesaid respondents have been adjudged in civil contempt of the Court for violating and disobeying its judgments and that they will take the action in purgation ordered by the Court;

and further, immediately posting copies of said notice together with the contempt adjudication, in conspicuous places, including all places where notices to employees customarily are posted, for a period of 60 days; said notices and copies of the contempt adjudication to be maintained in clearly legible condition throughout such posting period and not altered, defaced, or covered by any other material.

(iii) Filing a sworn statement with the Clerk of this Court and mailing a copy thereof to the Director of the Board's Third Region, Buffalo, New York, within 15 days after the entry of the adjudication and again at the end of the posting period, showing what steps have been taken by the respondents to comply with the Court's purgation order; and

(iv) Paying to the Board all costs and expenses, including attorneys' salaries, incurred by the Board in the investigation, preparation, presentation, and final disposition of these proceedings. Said amounts unless agreed upon, shall be fixed by further order of the Court upon submission by the Board of a verified bill of costs, and, it is

FURTHER ORDERED that to assure compliance with the Court's judgments, the Court hereby assesses a prospective fine in the amount of $500 per day on the respondents jointly and severally so long as full compliance is not forthcoming; and, it is

ORDERED that upon a failure of the respondents to purge themselves of civil contempt, as herein ordered, the Court may issue attachment against Sterritt and any other person, officer, or agent responsible for noncompliance.

/s/ Thomas J. Meskill
Thomas J. Meskill

/s/ Amalya L. Kearse
Amalya L. Kearse,
Circuit Judges.

Dated: March 25, 1980